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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/695,038

10/28/2003

Michael James Justin

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35467 7590 05/14/2008

BIOMERIEUX, INC.
PATENT DEPARTMENT
100 RODOLPHE STREET
DURHAM, NC 27712

EXAMINER

NAGPAUL, JYOTI

ART UNIT

PAPER NUMBER

1797

MAIL DATE

DELIVERY MODE

05/14/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/695,038	Applicant(s) JUSTIN ET AL.	
	Examiner JYOTI NAGPAUL	Art Unit 1797	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 February 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 4-12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1 and 4-8 is/are allowed.
- 6) ☒ Claim(s) 9-12 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Amendment filed on February 22, 2008 has been acknowledged. Claims 1 and 4-12 are pending.

Response to Amendment

Rejection of Claims 1-2 and 8-10 as being unpatentable over Fanning (EP 802413) in view of Maes (EP 896224) has been modified in light of applicants' amendments.

Rejection of Claims 4-5 as being unpatentable over Fanning (EP 802413) in view of Maes (EP 896224) as applied to claim 1 above, and further in view of Clark has been modified in light of applicants' amendments.

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

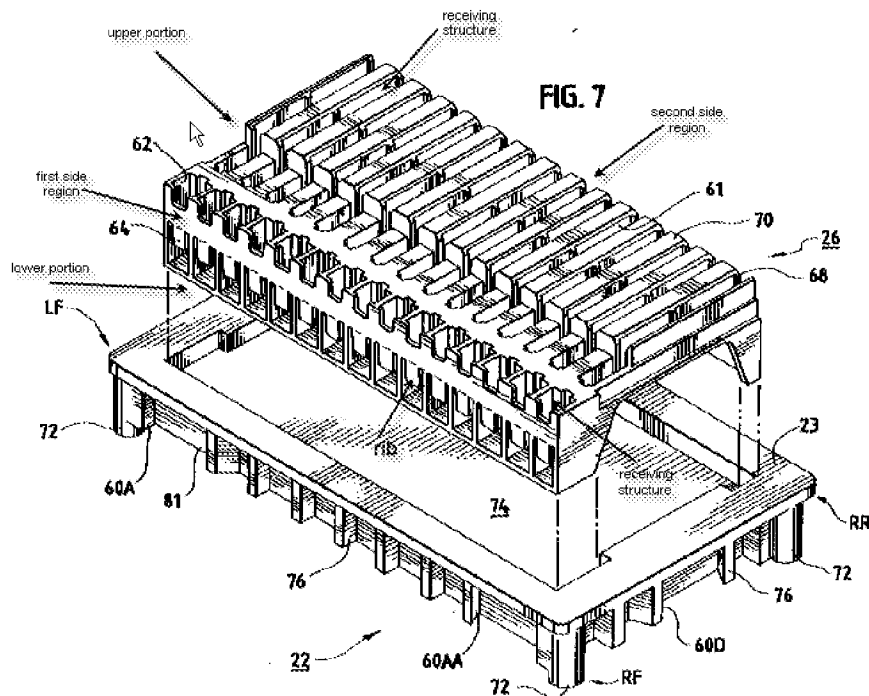
2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. **Claims 9-12** are rejected under 35 U.S.C. 103(a) as being unpatentable over Fanning (EP 802413) in view of Stevens.

Fanning teaches a carrier for holding test samples comprising a body having an upper portion, a lower portion a lower surface and first and second side portions. The body further comprising a rib projecting from the lower surface placed between the first and second side regions. The carrier further comprises receiving structures in the upper portion for holding up to N test sample devices and up to N test tubes containing test samples, where N is an integer greater than 1. The carrier further comprising a portion comprising a handle and an opposite portion having a fiat panel for receiving a machine readable indicium. (See Figure below) The test sample devices comprise multi-well test sample cards (28).



Fanning fails to teach N optical interrupt positioning features comprising N voids formed in the rib projecting from the lower surface, each of the voids placed in registry with one of the receiving structures for detection of one of the positioning features by a fixed optical interrupt sensor in the sample testing instrument. Fanning further fails to teach the carrier comprises alphanumeric indicia for the receiving structures. (See Figure 7)

Stevens teaches an analytical instrument with two moving trains of sample holders. The sample holder comprises N optical interrupt positioning features comprising N voids formed in the rib (50). Each of the voids are placed in registry with one of the receiving structures (204) for detection of one of the positioning features by a fixed optical interrupt sensor in the sample testing instrument. (See Figure 7) The carrier further comprises alphanumeric indicia for the receiving structures.

It would have been obvious to one having ordinary skill in the art to provide the carrier of Fanning with N optical interrupt positioning features comprising N voids formed in the rib projecting from the lower surface, each of the voids placed in registry with one of the receiving structures for detection of one of the positioning features by a fixed optical interrupt sensor in the sample testing instrument to achieve the predictable results of performing the desired analysis of the sample when it passes through the optical sensor in the instrument. Therefore, minimizing or eliminating the attention of an operator and making the process fully automated.

Allowable Subject Matter

Claims 1 and 4-8 are allowed. Prior art fails to teach or fairly suggest a carrier for movement of test sample devices through an automated sample testing instrument, the carrier having N receiving structures for receiving N test sample devices and N vessel receiving structures for receiving N vessels containing a fluid test sample, where N is an integer greater than one, each receiving structure for receiving a test sample device, the improvement comprises providing N optical interrupt positioning features formed in the carrier, each of the positioning features placed in registry with one of the receiving structures, whereby detection of one of the positioning features by a fixed optical interrupt sensor in the sample testing instrument detects a position of a test sample device placed in the receiving structure corresponding to the positioning feature. The carrier is moved through the instrument in a direction along a path of movement having a longitudinal axis, the test sample devices are oriented in the carrier in a direction orthogonal to the longitudinal axis, and wherein the positioning features are arranged on

the carrier in a direction parallel to the direction of movement of the carrier in the instrument. The carrier further comprises an upper surface and a lower surface and first and second side regions, and wherein the positioning features comprise voids formed in a rib projecting from the lower surface, the rib placed between the first and second side regions. The fixed optical interrupt sensor is positioned in the instrument along the path of movement of the carrier wherein the rib passes over the optical interrupt sensor.

Response to Arguments

5. Applicant's arguments with respect to claims 9-12 have been considered but are moot in view of the new ground(s) of rejection. Refer above.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI NAGPAUL whose telephone number is (571)272-1273. The examiner can normally be reached on Monday thru Friday (10:00-7:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jill Warden can be reached on 571-272-1267. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1797

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jill Warden/
Supervisory Patent Examiner, Art Unit 1797

JN